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No. 02-342

IN THE

Supreme Court of the United States

KEY PHARMACEUTICALS, SCHERING-PLOUGH CORPORATION AND SCHERING CORPORATION,
Petitioners,

v.

FREDERICK D. EDWARDS, M.D.,
Respondent.

On Petition for a Writ of Certiorari to the Oregon Court of Appeals

BRIEF OF *AMICUS CURIAE* AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICUS CURIAE* AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE* [1]

The American Insurance Association ("AIA") is the leading property and casualty insurance trade organization in the United States. It represents some 410 insurers that write in excess of $87 billion in premiums nationwide. AIA member companies write every type of property and casualty

[1] Counsel of record for both Petitioners and Respondent have consented to the filing of this brief in letters that have been lodged with the clerk. No counsel representing a party authored this brief in whole or in part, and no person or entity other than the *amicus curiae* and its members made a monetary contribution to the preparation or submission of this brief. An affiliate of a member of *amicus curiae* is an insurer of Petitioners.

insurance, including products liability insurance covering the type of liability for which punitive damages were awarded in this case.

AIA has a significant interest in this Court's resolution of the appellate standard of review issue raised by the decision below. The Oregon courts do not apply a *de novo* standard of review to a jury's award of punitive damages. Instead, the Oregon courts apply a deferential standard whereby a jury's punitive award is upheld if, construing the evidence in favor of the verdict, a "rational juror" could award such damages. This approach significantly erodes the meaningful and searching review mandated by this Court's due process jurisprudence. *See Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996).

AIA members have a strong interest in ensuring meaningful judicial review, which this Court has identified as the primary check on runaway verdicts. *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994). Liability insurers ultimately bear a significant portion of the costs of punitive damages awarded by juries. AIA, therefore, submits this brief in support of Petitioners.

REASONS FOR GRANTING THE WRIT

Certiorari is warranted to correct Oregon's repeated failure to observe the Court's due process standards in this frequently litigated area of the law. In *Oberg*, 512 U.S. at 421, the Court declared unconstitutional Oregon's "'system of trial by jury in which the judge is reduced to the status of a mere monitor.'" *Id.* (citation omitted). Following *Oberg*, the Court has made clear the constitutional mandate for meaningful judicial scrutiny of punitive damage awards. *See Cooper Indus.*, 532 U.S. 424; *BMW of N. Am. v. Gore*, 517 U.S. 559.

But the Court's message has not been heard. After *Oberg*, Oregon has continued to adhere to a standard of review that effectively makes the jury the final arbiter of the amount of punitive damages for federal constitutional purposes. In Oregon, every reviewing court—both trial and appellate—applies a "rational juror" standard that is not appreciably different from abuse of discretion review, in terms of both substance and practical effect. Under this approach, the jury's punitive award is upheld if, construing the evidence in favor of the verdict, a rational juror on the trial record could award such damages. (App. 154-55). This approach does not satisfy the constitutional standards laid down in *Cooper Industries*, *BMW*, and *Oberg*. Those cases require a searching judicial review, not a stunted and superficial review.

Oregon's departure from the requirements of this Court's precedents puts it in conflict with other courts. Several state and federal courts have held that the *BMW* inquiry calls for plenary review and therefore no deference is owed to the jury's findings.[2]

The Oregon court's ruling also deepens disagreement among the courts on a related issue. Oregon and a minority of courts intermingle the *BMW* guideposts with state law factors, such as the defendant's wealth, that have little or nothing to do with the constitutional issue of fair notice.[3]

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[2] *See, e.g., In re Exxon Valdez*, 270 F.3d 1215, 1239 (9th Cir. 2001); *Zimmerman v. Direct Fed. Credit Union*, 262 F.3d 70, 82 (1st Cir. 2001); *Aken v. Plains Elec. Generation & Transmission Coop., Inc.*, 49 P.3d 662, 668 (N.M. 2002); *Horton Homes, Inc. v. Brooks*, No. 1000346, 2001 WL 1520623, at *10 (Ala. Nov. 30, 2001), *cert. denied*, 122 S. Ct. 1911 (2002). *But see Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 272 F.3d 1335, 1349 (Fed. Cir. 2001), *petition for cert. filed*, 71 U.S.L.W. 3117 (U.S. July 24, 2002) (No. 02-130); *Ibaenez v. Velasco*, No. 96 C 5990, 2002 WL 731778, at *13 (N.D. Ill. Apr. 25, 2002).

[3] *See, e.g., Nat'l Ins. Ass'n v. Sockwell*, No. 1001627, 2002 WL 399041, at **22-27 (Ala. Mar. 15, 2002); *Parrott v. Carr Chevrolet, Inc.*, 17 P.3d 473, 484 (Or. 2001).

This reflects confusion of the federal constitutional issue with state law issues. By contrast, the majority of courts assess the *BMW* factors separately from the state law factors.[4]

The question of the proper standard of review is one of significant, recurring importance. In almost all cases in which punitive damages are awarded, the trial court will be asked to evaluate the award under the federal constitutional standards. The trial court inevitably will face the question of what deference should be given to the jury's award. Despite evidence of conflicting approaches in the courts, the constitutional origins of the *BMW* standard require a uniform federal standard for review regardless of the state where the claim arose. Further, the conflict is now firmly entrenched and incapable of resolution except by this Court. The Oregon courts, for example, repeatedly have held that the rational juror standard does not violate *BMW* or *Cooper Industries*.[5] Immediate review is urgently needed to restore certainty to this area of the law and to require observance of this Court's due process requirements.

I. OREGON'S RATIONAL JUROR STANDARD CONFLICTS WITH *COOPER INDUSTRIES* AND *BMW*

This case is one in a series of punitive damages cases in which the Oregon courts have confused and conflated the state and constitutional standards for judging the exces-

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[4] *See, e.g., Wightman v. Consol. Railcorp.*, 715 N.E.2d 546, 552-54 (Ohio 1999), *cert. denied*, 529 U.S. 1012 (2000); *Romo v. Ford Motor Co.*, 122 Cal. Rptr. 2d 139, 162-66, 99 Cal. App. 4th 1115, 1146-52 (Cal. Ct. App. 2002); *In re New Orleans Train Car Leakage Fire Litig.*, 795 So. 2d 364, 382-88 (La. Ct. App. 2001).

[5] *See Parrott v. Carr Chevrolet*, 17 P.3d at 481-85; *Williams v. Philip Morris Inc.*, 48 P.3d 824, 836-37 (Or. Ct. App. 2002); *Bocci v. Key Pharmaceuticals, Inc.*, 35 P.3d 1106, 1109-11 (Or. Ct. App. 2001), *review denied*, 47 P.3d 486 (Or. 2002).

siveness of a punitive damages award. In Oregon, the courts decide the ultimate constitutional question of excessiveness under a "rational juror" standard of review. This standard has allowed the Oregon courts to pay lip service to this Court's due process jurisprudence while, in reality, maintaining the system of superficial or nonexistent judicial review struck down in *Oberg*.

A. The Development of Oregon's Rational Juror Standard

From 1910 to 1994, Oregon was the only state in the nation where the courts could not correct excessive verdicts for punitive damages. *Oberg*, 512 U.S. at 426-28. The Oregon constitution required a procedure that amounted to a "'system of trial by jury in which the judge is reduced to the status of a mere monitor.'" *Id.* at 421. (citation omitted). In 1994, this Court declared Oregon's procedures unconstitutional because they provided "no assurance that those whose conduct is sanctionable by punitive damages are not subjected to punitive damages of arbitrary amounts." *Id.* at 429. The Court remanded the case without deciding what standard of review was constitutionally required.

On remand, the Oregon Supreme Court adopted a "rational juror" standard:

> A jury's award of punitive damages shall not be disturbed when it is within the range that a rational juror would be entitled to award in the light of the record as a whole; the range that a rational juror would be entitled to award depends, in turn, on the statutory and common law factors that allow an award of punitive damages for the specific kind of claim at issue.

Oberg v. Honda Motor Co., 888 P.2d 8, 10 (1995), *cert. denied*, 517 U.S. 1219 (1996).

But with the explosive growth in excessive punitive damages verdicts, this Court subsequently laid down the substan-

tive law for trial courts to apply in judging the excessiveness of a punitive award. *BMW*, 517 U.S. at 575-85. The *BMW* analysis calls for measuring the punitive award (1) on a scale of reprehensibility, (2) in relationship to the seriousness of the actual or threatened injury, and (3) through the prism of comparable legal and legislative sanctions. *Id.* Each of these measurements looks for guidance to outside criteria of general applicability that not only are legal in nature, but were not on trial in the courtroom. *See id.* In *Cooper Industries*, the Court subsequently held that appellate courts must review *de novo* the trial court's *BMW* analysis, rather than applying an abuse of discretion standard. 532 U.S. at 443.

Despite those clear rules, the Oregon Supreme Court adopted a reading of *BMW* under which it asserted that the state "rational juror" standard survived. *Parrott*, 17 P.3d at 480-85. The court held that, "*Gore* has not 'superseded' the rational juror standard that this court articulated in *Oberg*." *Id.* at 484. The Oregon Supreme Court justified this reading in part on its obligation "to give effect, to the greatest extent possible," state law requirements potentially conflicting with federal constitutional law. *Id.* at 485. The state constitution made calculating punitive damages a function of the jury. *Id.* at 484. In the Oregon court's view, the rational juror standard best balanced the competing mandates of the state and federal constitutions. *Id.* at 484-85.

The Oregon Supreme Court further held that the *BMW* factors would be considered part and parcel of the state law excessiveness analysis. *See, e.g.*, *Parrott*, 17 P.3d at 484 ("[W]e conclude that the guideposts announced in *Gore* are additional factors for the reviewing court in Oregon to consider as part of the . . . rational juror review."). In other words, when a federal due process challenge is raised, the Oregon courts review the jury's award by combining the *BMW* guideposts with the statutory factors considered when

reviewing punitive damage awards under state law. There is no separate or independent analysis of the *BMW* factors. *See, e.g. Parrott,* 17 P.3d at 483-484 (in finding the "range that a rational juror would be entitled to award," the court "combin[es] the factors announced by the Supreme Court in *Gore* with those announced by this court in *Oberg* (state)"); *see also Lakin v. Senco Prods., Inc.*, 987 P.2d 463, 476 (Or. 1999) (disposing of due process argument and state law excessiveness argument in a single paragraph, citing only Oregon law).

B. The Rational Juror Standard Essentially Repudiates *BMW* and *Cooper Industries*

Oregon's "rational juror" standard conflicts with *BMW* and *Cooper Industries* in two respects.

First, Oregon has diluted the *BMW* substantive standard by combining it with the state test for excessive punitive damage awards. These tests are analytically distinct, pursue different ultimate determinations and hence require two separate inquiries. State law factors having little or nothing to do with fair notice should not be fused with *BMW*'s guideposts. This Court made clear that the three measures described in *BMW* are designed to help a reviewing court determine the maximum amount of punitive damages a state can impose without denying a defendant's right to due process.[6] In contrast, state law tests for excessiveness are generally aimed at determining whether a punitive damage award is the result of passion and prejudice. Put simply, *BMW* asks whether a defendant had fair notice, while state law typically asks whether a reasonable jury could have imposed the amount in question.

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[6] *See Johansen v. Combustion Eng'g, Inc.*, 170 F. 3d 1320, 1334 (11th Cir.) ("*BMW* makes clear that there is a constitutional limit on a punitive damage award beyond which neither the jury nor the court has any discretion to venture."), *cert. denied*, 528 U.S. 931 (1999).

Additionally, some state law factors are actually inconsistent with due process considerations. For example, when intermingling state law factors with *BMW*'s standards, the Oregon courts have cited the defendant's ability to pay as a basis for upholding a punitive damage award. *See, e.g.*, *Philip Morris*, 48 P.3d at 840-41. Although Oregon law provides that the defendant's wealth has a place in assessing the amount of punitive damages in the first instance, and in reviewing a punitive award for excessiveness, see Or. Rev. stat. § 30.925(2)(f), this Court made clear in *BMW* that a defendant's wealth has no bearing on whether a punitive award violates due process: "The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business." *BMW*, 517 U.S. at 585.

Second, and more fundamentally, Oregon's rational juror standard is not constitutionally acceptable. In fact, the Oregon standard is utterly misdirected by using an approach designed only for review of a jury's findings to review trial judge determinations made largely on the basis of factors outside the record. *BMW* requires a reviewing court to undertake a function distinctly different from confirming that a jury award is rational. The *BMW* analysis assumes that a rational jury could have rendered the award consistently with the record and proper legal instructions. Indeed, if there is any question whether the award comports with the record and instructions or otherwise complies with the applicable state law, courts should address those issues first by reducing or vacating the award under state law pursuant to basic principles of constitutional avoidance. *BMW* instead asks a court to determine whether a punitive damages award that fully complies with state law nonetheless violates the federal Constitution. In other words, *BMW* assumes that the jury did its job properly under state law.

The *BMW* inquiry is a comparative legal analysis that looks at factors ***outside*** the record in order to ascertain whether the defendant "receive[d] fair notice . . . of the severity of the penalty that a State may impose." *BMW*, 517 U.S. at 574. Thus, in determining the degree of reprehensibility of the defendant's conduct, this Court did not confine itself to evidence of record but examined case law and statutes relevant to the gravity of the applicable conduct. *See id.* at 575-76. The Court created a spectrum of degrees of reprehensibility by using other cases and then evaluated the defendant's reprehensibility according to its location on this spectrum. This comparison obviously goes beyond review of the rationality of a jury finding. Similarly, the determination of the proportional relationship between compensatory and punitive damages is a legal standard for gauging the reasonableness of the damages award, *see id.* at 580-82, and not an examination of the record to find support for the jury's verdict. Finally, the comparison of the punitive damages award to legislative sanctions for comparable conduct is a legal inquiry that no jury undertakes. *Id.* at 583-84. It therefore makes no sense to apply a rational juror standard of appellate review to the ultimate constitutional question of excessiveness because the court is evaluating factors and evidence that were never before the jury and which it was the function of the trial court to assess in the first instance.

Oregon's rational juror standard derives from *Jackson v. Virginia*, 443 U.S. 307, 313 (1979), as a "sufficiency of the evidence" test for assessing a jury's findings of fact.[7] But the analogy to *Jackson* is misguided because the analysis of excessiveness under the Due Process Clause is not a review of jury findings of fact. As the Court recognized in *Cooper Industries*, "the jury's award of punitive damages does not constitute a finding of 'fact.'" *See Cooper Indus.*, 532 U.S.

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[7] *See Parrott*, 17 P.3d 483; *State v. Moore*, 927 P.2d 1073, 1096 (Or. 1996); *Oberg*, 888 P.2d at 11 & n.7.

at 437. Consequently, in examining whether the verdict for punitive damages is constitutionally acceptable, the inquiry is not an evidentiary probe of the factual record undertaken by the "rational factfinder" in *Jackson*. Rather, it is a legal analysis framed by the factors articulated in *BMW*, one major purpose of which is to look to punishment handed out elsewhere for similar or identical conduct in order to determine whether the sanctions imposed in the case at bar have a reasonable relationship to the offense committed. The distinction between the standards for jury review and review of the *BMW* factors is thus the difference between a review of the underlying facts and a review on the law—elevated in this instance to constitutional importance.[8]

Oregon's rational juror standard is in conflict with the basic rules of judicial review. While factual matters are reviewed only for clear error, courts customarily conduct plenary review of the governing legal standards.[9] Courts also conduct plenary review of so-called mixed questions of law and fact when that process is necessary to develop the meaning of a legal standard and to ensure its consistent application.[10] These are the very reasons why, as the Court recognized in *Cooper Industries*, there should be *de novo* review of punitive damages awards. *See Cooper Indus.*, 532

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[8] Oregon's ruling that a jury's award of punitive damages should be reviewed by the trial court under *Jackson*'s rational juror standard is misguided for another reason. It is typically not possible to tell what facts (if any) the jury found in setting an amount of punitive damages or what relative weight it gave to any facts that may have been found. A rule of deference to phantom findings is thus unworkable because it necessarily rests on speculation about the jury's reasons.

[9] *See, e.g., Ornelas v. United States*, 517 U.S. 690, 697, (1996).

[10] *See, e.g., Strickland v. Washington*, 466 U.S. 668, 698 (1984); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501 (1984); *Cuyler v. Sullivan*, 446 U.S. 335, 342 (1980); *Neil v. Biggers*, 409 U.S. 188, 193 n.3 (1972).

U.S. at 440 (noting that the development of the law at the appellate level gives guidance to the trial courts and promotes consistent outcomes).

The distinction between the two standards of review is not simply a technical difference but has real consequences in review for excessiveness. The Oregon courts have refused to reduce punitive damage awards in fourteen out of the fifteen cases since 1994, when this Court decided *Oberg*. (App. 118).

The decisional record thus demonstrates that Oregon has maintained the jury's role as the final arbiter of punitive damage awards. Oregon courts do not undertake a searching and independent review of the award, as mandated by *BMW* and *Cooper Industries*, but rather a severely constrained review that overturns only those jury awards so extreme as to be irrational. In effect, the role of the Oregon judge as a "mere monitor" has not changed since *Oberg*. This egregious failure to follow the established framework of this Court should be addressed immediately.

II. OREGON'S RATIONAL JUROR STANDARD CONFLICTS WITH DECISIONS OF OTHER COURTS

Oregon's departure from the requirements of this Court's due process jurisprudence puts it in conflict with other courts that faithfully apply that binding authority. Review by this Court is warranted to resolve that conflict.

Specifically, Oregon's rational juror standard creates a conflict with the First and Ninth Circuits and with the Supreme Courts of New Mexico and Alabama. All of those courts currently recognize that *Cooper Industries* requires appellate analysis of the *BMW* factors without deference

to the jury's award.[11] As the Alabama Supreme Court explained, "[i]n applying the *de novo* standard of review to [defendant's] constitutional challenge to the amount of the punitive-damages award, we must review the evidence and the law without deference to the jury's award or to the trial court's rulings." *Horton Homes*, 2001 WL 1520623, at *10.

Currently pending before the Court is a petition from the Federal Circuit that seeks review of the same conflict. In that case, the Federal Circuit deferred to the jury's finding on reprehensibility and, indeed, concluded that the *de novo* review required by *Cooper Industries* was "essentially meaningless." *Rhone-Poulenc Agro*, 272 F.3d at 1348; *accord Ibaenez v. Velasco*, No. 96 C 5990, 2002 WL 731778, at *13 (N.D. Ill. Apr. 25, 2002).[12]

In addition, the courts are divided on the question of whether the reviewing court can combine the *BMW* guideposts with the factors considered when reviewing punitive damage awards under state law. On the one hand, Oregon and a number of courts intermingle the state and federal inquiries.[13] On the other hand, many courts under-

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[11] *In re Exxon Valdez*, 270 F.3d at 1239-41; *Zimmerman v. Direct Fed. Credit Union*, 262 F.3d at 82; *Aken v. Plains Elec. Generation & Transmission Coop., Inc.*, 49 P.3d at 668; *Horton Homes*, at 2001 WL 1520623, at *10.

[12] *See also* Petition for a Writ of Certiorari at 14 (filed July 26, 2002), *DeKalb Genetics Corp. v. Bayer CropScience, S.A.* (No. 02-130) ("[T]he Federal Circuit's decision creates a division of authority over the extent to which a court conducting an excessiveness inquiry can defer to the jury's findings in determining that the defendant's conduct was reprehensible."). This case presents a better vehicle to resolve the conflict. The Federal Circuit's *DeKalb* decision focused only on the reprehensibility factor, while Oregon's "rational juror" standard also applies to all three *BMW* factors.

[13] *See, e.g., Parrott*, 17 P.3d at 484; *Nat'l Ins. Ass'n v. Sockwell*, 2002 WL 399041, at **22-27 (combining *BMW* guideposts with factors considered under Alabama law); *Welch v. Epstein*, 536 S.E.2d 408, 421-

take the *BMW* inquiry separate and independent of the state law standards.[14]

Legal commentators have urged the Court to provide further guidance in this important area of the law. For example, Cass R. Sunstein observed in his new book:

> *BMW* has spurred new thinking about how to limit jury discretion in awarding punitive damages. . . . Decisions of lower courts are in disarray, despite a Supreme Court decision calling for careful appellate review of constitutional challenges to punitive awards.

Cass R. Sunstein, *et al.*, *Punitive Damages: How Juries Decide* at 244 (2002).

Only this Court can end the widening confusion on this issue. Postponing review is not likely to contribute to consistent resolution of the questions presented here. The Oregon courts have already demonstrated that they will not alter their position in light of *BMW* and *Cooper Industries*.[15] Thus, Oregon's position and the resulting conflict is firmly entrenched and incapable of resolution except by this Court.

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23 (S.C. Ct. App. 2000) (combining BMW factors with state law factors); *Ford Motor Co. v. Ammerman*, 705 N.E.2d 539, 561-64 (Ind. Ct. App. 1999) (combining *BMW* guideposts with factors considered under Indiana law), *cert. denied*, 529 U.S. 102 (2000).

[14] *See, e.g.*, *Wightman v. Consol. Rail Corp.*, 715 N.E.2d at 552-54; *Romo v. Ford Motor Co.*, 99 Cal. App. 4th at 1146-52; *In re New Orleans Train Car Leakage Fire Litig.*, 795 So. 2d at 382-88; *Cass v. Stephens*, No. 08-97-00582-CV, 2001 WL 28092, at **30-33 (Tex. App. – El Paso 2001); *Baker v. Nat'l State Bank*, 801 A.2d 1158, 1163-76 (N.J. Super. Ct. App. Div. 2002); *see also Burton v. R.J. Reynolds Tobacco Co.*, 205 F. Supp.2d 1253, 1259-65 (D. Kan. 2002).

[15] *See Parrott*, 17 P.3d at 481-85; *Philip Morris*, 48 P.3d at 836-37; *Bocci*, 35 P.3d at 1109-11.

III. THIS CASE MERITS REVIEW BECAUSE OF INCREASING EVIDENCE THAT MEANINGFUL APPELLATE REVIEW IS ESSENTIAL TO SAFEGUARD AGAINST ERRATIC PUNITIVE DAMAGE AWARDS

This case represents more than just one State court cast adrift. It exemplifies the severe problem that can occur when trial courts abdicate their role in supervising awards of punitive damages. There is increasing evidence that jury awards of punitive damages are arbitrary, thus increasing the importance of the *de novo* judicial review mandated by *BMW* and *Cooper Industries*.

As this Court has repeatedly recognized, meaningful and effective judicial review of a jury's punitive verdict is necessary to protect against arbitrary punishment. *Oberg*, 512 U.S. at 452. In 1994, the Court observed that "[e]mpirical evidence, in fact, supports the importance of judicial review of the size of punitive damages awards." *Id.* at 433 n.11.

New and important scientific research on punitive damages decisionmaking strongly reinforces this conclusion. In particular, recent empirical studies by leading scholars show that even conscientious and well-intentioned juries produce systematically erratic and unpredictable awards. The results of this newly published research are both striking and sobering. Among the major findings:

- While jurors show remarkable consistency in ranking the "outrageousness" of wrongful conduct on a bounded scale (e.g., a scale of one to ten), their translation of such rankings into dollar punitive awards is enormously variable and unpredictable.
- Contrary to commonly-held belief, deliberation by groups of jurors does not moderate the unpredictability of punitive awards, but exacerbates such

unpredictability, with deliberating juries returning consistently higher and more variable awards than jurors individually.

- Juries assessing punitive damages will not and cannot apply standard economic deterrence theories, even when specifically instructed on how to do so.
- Juries assessing punitive damages impose significantly varying awards in response to inappropriate factors, including the amount requested in argument by plaintiffs' counsel and bias in favor of local plaintiffs.
- Juries assessing punitive damages exhibit both hindsight bias and irrational attitudes towards risk, for example awarding higher punitive damages against defendants who conduct cost/benefit analyses than against those who do not.

Cass R. Sunstein, Punitive Damages: How Juries Work (2002).

Importantly, these findings do not imply that jurors on the whole are not conscientious, intelligent, or properly motivated. Rather, they show that in the context of punitive damage decisions, juries return erratic and unpredictable dollar awards because of natural features of human cognition. Juries assessing punitive damages as one-time decisionmakers in isolated cases have no ready frame of reference for translating a desire to punish blameworthy conduct into dollar punishment. As a consequence, different juries will assess widely divergent dollar punishment for identical conduct against identical defendants in identical cases. And such decisions are distinctively susceptible to a variety of common cognitive biases, all of which the behavioral literature has observed in other decisionmaking contexts. The inescapable conclusion of this growing body of scientific literature is that dollar awards imposed by juries in isolated punitive damage cases do not reflect—and cannot be expected to reflect—

commonly shared values or objectives about either retribution or deterrence. Rather, the studies show that dollar awards are essentially arbitrary.

These findings confirm that vindication of the core due process concerns elaborated in *BMW*—fair notice of potential punishment and evenhanded treatment of similarly situated parties—will turn as a practical matter on the extent to which reviewing courts apply the *BMW* guideposts for constitutional review of punitive damages in consistent and predictable fashion.

Because due process rights are at stake, the need for this Court to act is all the more urgent. Minimum requirements of due process are not a matter of local discretion or option. Because of *BMW*'s constitutional basis, there must be a uniform standard. As Justice Breyer put it, it is "the uniform general treatment of similarly situated persons that is the essence of law itself." *BMW*, 517 U.S. at 587 (Breyer, J., concurring, joined by O'Connor and Souter, J.J.).

Because plaintiffs "fear appellate reduction of damages," *Oberg*, 512 U.S. at 433 n.11, the Oregon court's ruling will foster forum-shopping in the large percentage of cases where multiple venues are available. *See Norfolk & W. Ry. v. Ayers*, 122 S. Ct. 1434 (2002) (granting certiorari in a case where petitioner complained about increased forum shopping in West Virginia for federal tort claims).

In short, immediate review by this Court is needed to restore certainty to this important area of the law and assure that the lower courts are applying *BMW* and *Cooper Industries* in a consistent and effective manner.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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